

[Cite as *State v. Evans*, 2011-Ohio-1449.]

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 10CA0027

Appellee

v.

RICHARD C. EVANS

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF WAYNE, OHIO
CASE No. 07-CR-0223

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 28, 2011

MOORE, Judge.

{¶1} Appellant, Richard C. Evans, appeals from the judgment of the Wayne County Court of Common Pleas. This Court affirms.

I.

{¶2} This matter was previously before this Court in Evans’ direct appeal, *State v. Evans*, 9th Dist. No. 07CA0084, 2008-Ohio-5000. In that case, we affirmed the trial court and described the underlying facts as follows:

“In the early morning hours of August 11, 2006, a trailer was broken into and several guns were stolen. Detective Lemmon of the City of Wooster Police Department began investigating the break-in after he was contacted by a man who informed him that Evans, along with other individuals, had broken into the trailer. Detective Lemmon was informed that Evans and a woman named GG were attempting to sell the guns, and that they drove a silver Volkswagen Jetta. From this information, Detective Lemmon, while acting undercover, set up a meeting with Evans and GG. Officers conducting surveillance on the meeting site noted that the silver Volkswagen Jetta arrived at the meeting site and then left. Officers stopped the vehicle and located Evans in the vehicle along with Joshua Stanley and GG. Officers also located two guns in the vehicle, which were identified as

belonging to Stanley's step-father. Evans was eventually indicted and acquitted of receiving stolen property with respect to these guns.

"Stanley took Detective Lemmon to an apartment at 1784 Normandy Drive. Detective Lemmon obtained the owner's consent and searched the home. The search revealed six guns that were stolen from the trailer on August 11, 2006.

"Evans was indicted on one count of burglary, in violation of R.C. 2911.12, one count of theft, a violation of R.C. 2913.02, and one count of having weapons under a disability, in violation of R.C. 2923.13. On October 29 and 30, 2007, the case proceeded to a jury trial. The jury found Evans guilty on all the charges, and on November 6, 2007, he was sentenced to a total of ten years of incarceration." Id. at ¶2-4.

{¶3} On May 14, 2010, Evans filed in the trial court a "Motion for Resentencing Pursuant to R.C. §2945.75(A)(2), and STATE V. PELFREY []" [sic]. On May 19, 2010, the trial court filed an entry denying the motion.

{¶4} Evans timely filed a notice of appeal. He has raised one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERR[]ED WHEN IT FOUND THE GUILTY VERDICT CONSTITUTES A FINDING OF GUILTY GREATER THAN THE LEAST DEGREE OF THE OFFENSES CHARGED. U.S.C.A. 14, DUE PROCESS CLAUSE."

{¶5} In his assignment of error, Evans contends that, pursuant to *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, his convictions for burglary, theft and having weapons under disability were of the least degree of each offense. We conclude that Evans' argument is barred by res judicata.

{¶6} R.C. 2945.75(A)(2) provides that "[a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the

offense charged.” The *Pelfrey* Court held that pursuant to the clear language of R.C. 2945.75(A)(2), a verdict form signed by the jury must include either the degree of the offense or specify an aggravating element that has been found in order to justify a conviction beyond the lowest form of the offense. *Pelfrey* at ¶12. Pelfrey was charged with tampering with records, which is a misdemeanor unless an aggravating factor exists. *Id.* at ¶13. The aggravating factor was that Pelfrey tampered with government records, a circumstance that elevated the crime to a felony of the third degree. *Id.* “However, neither the verdict form nor the trial court’s verdict entry mention[ed] the degree of Pelfreys offense; nor [did] they mention that the records involved were government records.” *Id.* The Supreme Court held that Pelfrey could only be convicted of the least degree of the offense, a misdemeanor of the first degree. *Id.*

{¶7} Like Pelfrey, Evans’ conviction was previously affirmed on direct appeal. *Evans* at ¶42. The court of appeals, however, reopened Pelfrey’s direct appeal pursuant to App.R. 26(B). *Pelfrey* at ¶4. In this case, Evans never sought to reopen his direct appeal and, instead, now contends that his sentencing order is “non-final.” He has not cited, and we have not located, any authority to suggest that his sentencing order is not a final order. App.R. 16(A)(7). Additionally, we note that the sentencing entry filed November 8, 2007, complies with Crim.R. 32(C). See *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330.

{¶8} Instead, Evans’ contention is barred by the doctrine of *res judicata*. *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶16, citing *State v. Hutton*, 100 Ohio St.3d 176, 2003-Ohio-5607 (“any issue that could have been raised on direct appeal and was not is *res judicata* and not subject to review in subsequent proceedings”).

“Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the*

*defendant * * * on an appeal from that judgment.”* (Emphasis added.) Id. at ¶17, quoting *State v. Perry* (1967), 10 Ohio St.2d 175, paragraph nine of the syllabus.

The purpose of res judicata is to prevent situations such as this, in which Evans attempts to relitigate an issue on which he had “a full and fair opportunity to be heard.” Id. at ¶18. In preventing endless relitigation of issues, res judicata promotes finality and judicial economy. Id.

{¶9} The record reflects that Evans was represented by different counsel at trial than in his direct appeal. Moreover, *Pelfrey*, upon which he nearly exclusively relies, was decided on February 7, 2007. Evans was indicted on May 14, 2007. Evans cannot, therefore, claim ignorance of the Supreme Court’s holding in *Pelfrey*. Accordingly, because Evans could have raised issues related to the jury verdict forms in his direct appeal, he is foreclosed from raising the issue at this time. Id.

{¶10} Evans’ assignment of error is overruled.

III.

{¶11} Evans’ assignment of error is overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS

BELFANCE, P. J.
CONCURS, SAYING:

{¶12} I concur in the majority's opinion because unlike the defendant in *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, at ¶4, Mr. Evans has not utilized the appropriate procedural mechanism to raise this issue in this Court.

APPEARANCES:

RICHARD C. EVANS, pro se, Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.